



DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AQ11

VA Vocational Rehabilitation and Employment Nomenclature Change for Position Title - Revision

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This final rule adopts, without change, an interim final rule published in the Federal Register on November 17, 2017, which affirmed a May 2, 2016, final rule amending Department of Veterans Affairs (VA) regulations to reflect a nomenclature change in the title of certain personnel hired by VA’s Veteran Readiness and Employment (VR&E) Service, previously known as Vocational Rehabilitation and Employment Service. The preamble to the interim final rule corrected inaccuracies in the preamble to the 2016 final rule and provided additional explanation of the basis for the rule.

DATES: This rule is effective [Insert date of publication in the FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: On May 2, 2016, VA published a final rule (referred to as “May 2016 final rule” or “final rule”) in the Federal Register at 81 FR 26130, amending its regulations to reflect a nomenclature change in the title

of certain personnel hired by VA's VR&E Program. On November 17, 2017, VA published an interim final rule (referred to as "November 2017 interim final rule" or "interim final rule") in the Federal Register at 82 FR 54295 affirming the May 2016 final rule. In the preamble to the November 2017 interim final rule, VA corrected some inaccurate statements and citations in the preamble of the May 2016 final rule and provided additional explanation of the basis for the rule. Although the interim final rule was effective upon publication, VA provided a 30-day comment period, which ended on December 18, 2017.

VA received a multitude of comments, including comments on the May 2016 final rule, from one individual. The one commenter had challenged promulgation of both the May 2016 final rule and the November 2017 interim final rule under 38 U.S.C. 502 as arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in the United States Court of Appeals for the Federal Circuit (Federal Circuit), and also claimed there was not good cause for dispensing with a notice-and-comment period and a delayed effective date. The Federal Circuit found that promulgating the rule was not arbitrary, capricious, or a violation of law, and that VA had good cause to expedite implementation of the rule. *Conyers v. Sec'y of Veterans Affairs*, 750 Fed. Appx. 993 (Fed. Cir. 2018).

First, the commenter indicates three "distinct factors" to oppose promulgation of the interim final rule. The first factor addresses the differences between the duties and responsibilities of the two positions of counseling psychologist (CP) and vocational rehabilitation counselor (VRC). The commenter states, "it is indisputable that there are several critical distinctions in the unique training matrices, core competencies and knowledge, and qualifications that are unique for each of said professions." In addition, the commenter states that VA "conflat[ed] the diverse diagnostic, psychotherapeutic,

and paraprofessional credentials, duties, and responsibilities inherent for such professions” and that VA “fail[ed] to either acknowledge or account for the apposite governing standards of certification requisites, licensure criteria, and methodological practices for said professions.”

While the education, qualifications, and experience for CPs and VRCs may not be absolutely identical, VRCs are qualified to meet VA’s statutory requirements to provide rehabilitative services and perform the duties of the position, as outlined in the regulatory amendments made by the final rule. As stated in the November 2017 interim final rule, the requirements for the VRC position “are comparable to the requirements applicable to CP positions but are more accurately aligned with the needs of the VR&E program, which is focused on helping Veterans obtain and maintain suitable employment.” 82 FR 54296. The commenter’s assertions of differences between CPs and VRCs does not change that assessment. The Federal Circuit concluded that the difference in hiring standards does not violate any laws that would render the rule unlawful. *Conyers*, 750 Fed. Appx. at 998. Therefore, we will not make any changes based on this comment.

The second factor stated by the commenter is that VA “conflat[ed] the duties and responsibilities of CPs hired in GS-0180 positions and VRCs hired in GS-0101 positions to provide the same type of rehabilitation services and perform the same work.” In addition, the commenter states that VA did not collaborate with the Office of Personnel Management (OPM) in “effecting modifications of, amendments to, or deviations from the Federal classification standards for said positions prior to [VA] implementing such amalgamation.” The commenter’s statements again focus on the differences in the roles and responsibilities between a CP and a VRC. Under 38 U.S.C. 3118(c), VA has the

discretion to establish qualifications for personnel providing evaluation and rehabilitation services. Also, there is no requirement that the VA Secretary collaborate with OPM when developing policies and procedures relating to the establishment and maintenance of standards. The Federal Circuit confirmed that there is no requirement to consult with OPM before making hiring changes. *Id.* With regard to conflating the duties and responsibilities of CPs and VRCs, the Federal Circuit stated that VA “has shown a rational connection between the facts found and the choice made.” *Id.* at 999. Therefore, we will not make any changes based on these comments.

The third factor stated by the commenter asserts “highly dubious acts and omissions committed by [VA] in the course of promulgating regulations, policies, and procedures governing the administration and provisioning of Chapter 31 vocational rehabilitation benefits, services, and assistance.”

With regard to this factor, the commenter raises three assertions, the first of which concerns the position description for VRCs. The commenter claims that the qualification requirements for the VRC position, as indicated in VR&E Letter 28-14-13, are “on par with the universally-recognized core competencies, duties, and responsibilities commonly performed by a Counseling Psychologist even though such an expectation esoterically transcends commonly acknowledged and recognized standards regarding the curriculum, core competencies, certification requisites, and licensing criteria applicable in the training and qualifications of Vocational Rehabilitation Counselors/Specialists.” As the interim final rule does not utilize the term “Vocational Rehabilitation Specialists,” we will assume the commenter is referring to the VRC position when he refers to “Vocational Rehabilitation Specialists.” The qualifications for VRCs are found in VA's Staffing Handbook (VA Handbook 5005/6, Part II, Appendix F2

(June 3, 2004)), and the knowledge they must possess is described in the position description released with VR&E Letter 28-14-13 on February 20, 2014. As we explained in the interim final rule, VRCs “can capably and competently perform the required counseling, rehabilitation, and employment assistance tasks” and are, therefore, qualified to provide vocational rehabilitation services and benefits to participants of the VR&E program. 82 FR 54296. And the Federal Circuit confirmed that VRCs, in performing their duties, “meet VA’s statutory obligations to provide rehabilitation services to veterans.” *Conyers*, 750 Fed. Appx. at 998. Therefore, we will not make any changes based on this comment.

Second, the commenter asserts that the administrative record, apparently referring to the administrative record of the final rule, published in the Federal Register at 81 FR 26130, is “tenebrous.” The commenter states that, since the December 16, 2003, Performance Plan never existed, it “evinces [VA] committed acts and omissions that are arbitrary, capricious, and abuse of agency discretion, and otherwise contrary to law while promulgating regulatory amendments.” VA acknowledged deficiencies in the record associated with the final rule and published an interim final rule at 82 FR 54295 to address any inaccuracies in that record and to explain the basis for the final rule more clearly. Specifically, the preamble to the interim final rule addressed the inaccurate statements concerning the December 16, 2003, Performance Plan. 82 FR 54295. As explained in the interim final rule, the performance plan referenced as being released on December 16, 2003, was delayed and subsequently released on July 1, 2004. There was no arbitrary or capricious act of omission, or an abuse of agency discretion. Rather, VA simply made inadvertent misstatements in the final rule preamble, including stating that the performance plan demonstrated that

the duties of a CP and a VRC were the same; however, in the interim final rule, VA acknowledged and corrected all misstatements. Indeed, the Federal Circuit concluded that “the Secretary’s actions in promulgating the rules at issue [were not] arbitrary and capricious.” *Conyers*, 750 Fed. Appx. at 998-999. Thus, we will not make any changes based on these comments.

Related to the second assertion, the commenter states that, notwithstanding VA’s “insistence that failure to maintain the 02 May 2016 Final Rule’s regulatory amendments will adversely affect the processing and provisioning of Chapter 31 vocational rehabilitation benefits, services, and assistance to Veterans, it is abundantly clear that Veterans have long been, and will continue to be, harmed by [VA’s] failure to comply [with] APA rulemaking procedures.” We noted in the interim final rule that we did not have enough CPs in our national workforce (at the time of publication, only 10 CPs were employed across the nation) to fulfill all required duties, and that we were no longer hiring under the CP title. Thus, to provide benefits effectively and efficiently, we needed to amend the regulations to grant VRCs authority previously exercised by CPs. The Federal Circuit found that the facts sufficiently supported this grant of authority. *Conyers*, 750 Fed. Appx. at 999. And, given the shortage of CPs, the Federal Circuit further found that VA had sufficiently good cause to expedite implementation of the regulatory amendments while completing the rulemaking process. Therefore, we will not make any changes based on this comment.

The commenter’s third assertion expresses concern that VA had “prior knowledge of deficiencies in the VR&E Program” and references documents that were part of the administrative record of the interim final rule that indicate that VA knew the 38 CFR part 21 regulatory guidance only referenced CPs and not VRCs and VRCs when it discussed certain job duties that are part of the rehabilitation

process. The commenter is correct that certain sections of the CFR referenced only CPs. Publication of the final rule amended the CFR to include references to VRCs as well. It is not clear to what deficiencies the commenter refers, but we previously explained that, in the interim final rule published at 82 FR 54295, we addressed any misstatements and were revising the CFR to address any deficiencies. Thus, we will not make any changes based on this comment.

The commenter offers four additional reasons for not promulgating the final rule. The first reason concerns an email correspondence between a Veteran's advocate and a VR&E staff member from September 2014. The commenter states that the "narration of a Veterans advocate contacting VR&E Service regarding the roles of CPs and VRCs is inexact as it disingenuously fails to convey the full substance of said interaction." The commenter seems to be dissatisfied with VR&E Service's response to the Veteran's advocate. The response indicated that we were addressing the issue with VA's Office of General Counsel and would likely make a regulatory change as soon as possible. The regulatory change was made in May 2016 by final rule, and, by interim final rule in November 2017, VA corrected all inaccuracies. Therefore, we will not make any changes based on this reason.

The second reason states "notwithstanding the lack of any qualifying information regarding the number of remanded cases or the period such remands were rendered, proclaiming that because BVA remanded VR&E cases with instructions for a CP instead of VRC to render the determinations required by apposite regulations necessitated the regulatory amendments initially pronounced in the 02 May 2017 Final Rule [81 FR 26130] and fully adopted in the 17 November 2017 Interim Final Rule is spurious reasoning." We explained in the interim final rule that the Board of Veterans' Appeals (BVA) had been

remanding cases to VR&E regional offices with instructions to have a CP make a specific decision as required by regulatory guidance, and that, consequently, we were amending our regulations because we did not have enough CPs to comply with the BVA's remand instructions. The Federal Circuit found this reasoning to be rational and our actions not to be arbitrary and capricious. *Conyers*, 750 Fed. Appx. at 999. Therefore, we will not make any changes based on this reason.

The commenter asserts as third and fourth reasons that VA's position that "the regulations codified in Part 21 required amendment to 'clear[] up confusion among VR&E program participants' regarding the roles of a CP and a VRC explicitly delegated by the apposite regulations is beyond fallacious. It is highly obvious such 'confusion' directly resulted not from VR&E program participants' misunderstanding or misconstruing the regulations but from [VA's] noncompliance with Part 21." The commentor also mentions "purported confused VR&E program participants." We did not state or imply that VR&E's population was uninformed or misled; rather we acknowledged a lack of consistency between the regulatory guidance in 38 CFR part 21 and VR&E's actual practice, and then addressed the inconsistency by amending the regulations to more accurately reflect VR&E's practice and clearly, concisely, and correctly state who will be making benefit determinations. Therefore, we will not make any changes based on these reasons.

These four reasons culminate in the commenter's statement that VA had "long possessed more-than-adequate knowledge of the systemic noncompliance with Part 21 in order to reasonable facilitate reasoned decision making and allow for a sufficient notice-and-comment period instead of promulgating and immediately effecting the 02 May 2016 Final Rule [81 FR 26130] upon conclusory and illusory rationale." Finally, the commenter discusses three

“circumstances” – which he describes as “mendacious stratagem,” “unpersuasive reasoning,” and “harmful effects to Veterans” - “which further demonstrates [VA] committed acts and omissions that were arbitrary, capricious, an abuse of agency discretion, and otherwise contrary to law in promulgating the subject amendments.” He further claims that VA’s “hasty, headlong effort to avoid scrutiny of the VR&E program continued harming Veterans through improper evaluations, inappropriate counseling, and delayed rehabilitation programs conducted by unqualified VRCs.” In essence, the commenter restates previous comments concerning what he believes to be improper (harmful and arbitrary and capricious) acts. However, if the rule changes were not promulgated, effective immediately, and CPs were required to make all rehabilitation determinations, it would have been impossible for VR&E to provide rehabilitation services to our beneficiaries. And, as the Federal Circuit found, the Secretary of Veterans Affairs has the discretion to determine the qualifications for personnel providing rehabilitation services and the rules promulgated are in accordance with law and not arbitrary and capricious. *Conyers*, 750 Fed. Appx. at 997-999. Ultimately, the Federal Circuit concluded, “[b]ecause Mr. Conyers has not sufficiently shown a violation of federal law or that the Secretary’s actions were arbitrary and capricious, we cannot now say that the Secretary was acting beyond the scope of his authority by promulgating the November 2017 Revised Rule with an immediate effective date.” *Id.* at 999.

Therefore, based on the rationale set forth in the interim final rule and in this document, VA is adopting the provisions of the interim final rule as a final rule with no changes. VA appreciates the comments submitted in response to the interim final rule.

Administrative Procedure Act

On November 17, 2017, VA published an interim final rule (82 FR 54295) and determined that there was a basis under the Administrative Procedure Act for issuing the interim final rule with immediate effect. VA has considered all relevant input and information contained in the comments submitted in response to the interim final rule and has concluded that no changes to the interim final rule are warranted. VA is adopting the provisions of the interim final rule as a final rule with no changes.

Executive Orders 12866, 13563 and 14094

Executive Orders 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order

14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule will not directly affect any small entities; only individuals will be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.116, Vocational Rehabilitation for Disabled Veterans.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on July 10, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

PART 21 – VETERAN READINESS AND EMPLOYMENT AND EDUCATION

Accordingly, the interim final rule published in the Federal Register on November 17, 2017, at 82 FR 54295, amending 38 CFR part 21, is adopted as a final rule without change.

